No. 20942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT C. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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To the Honorable Frederick G. Hamley and Ben C. Duniway, Judges of the United States Court of Appeals, Ninth Circuit and Judge Copple, District Judge:

Comes Now the Appellant in the above-entitled case, and respectfully prays the court to grant a rehearing.

1. The major issue in the present posture of this case is whether books and records unlawfully seized from the corporation can be introduced in evidence against the president and sole owner of (no stock was issued) the corporation, the only person operating the corporation.

The facts regarding the search and seizure of the records of I.A.L.S. were adequately set forth below (Appellant's Op. Br. pp. 2-5). The record leaves no doubt that Appellant could not have been convicted without the illegally seized items.

This court found that *Jones v. United States,* 362 U.S. 257 (1960) was not controlling and affirmed the conviction of Appellant. *Jones,* concurred in by nine justices, is the only Supreme Court expression on standing in the search and seizure area. Essentially, it abrogated "subtle distinctions . . . of private property law" from the search and seizure area and held that it was no longer necessary to admit possession of goods in order to challenge the seizure of those goods. It was not limited to crimes wherein possession itself is sufficient for conviction.

Prior to *Jones,* an individual in control of a corporation did not have standing to assert the invalidity of a search of the corporation. *Lagow v. United States,* 159 F. 2d 245, 246, Cert. Den. 331 U.S. 858, quoted in the opinion of this court. *Lagow,* was widely followed in the Federal Courts, however, there has never been a Supreme Court decision on this point.

Subsequent to *Jones, Lagow* has not been followed by the Federal Judiciary, indeed frequently it has not even been cited in cases involving similar facts. A review of the cases in the various circuits demonstrates the implied repudiation of the standing theory of *Lagow.*

Second Circuit.

Lagow was followed in *United States v. Guterma,* 272 F. 2d 344, at 346 (19....) and *United States v. H.J.K. Theater Corporation* (236 F. 2d 502) (1956) but has not been followed since. In a recent District Court decision, *United States v. Birrell,* 242 F. Supp. 191 (1965) U.S.D.C.N.Y. involving facts almost identical to those in the case at bar, a half-hearted attempt

was made to distinguish *Lagow* and *Guterma,* the court concluding:

> "If the distinctions above suggested between *Guterma* and *Lagow* on the one hand and the case at bar on the other are not valid, I would then conclude that *Guterma* and *Lagow* ought not to be followed because *Jones* has left them without authority in such a situation as we have here." (p. 201).

Fourth Circuit.

United States v. Hopps, 331 F. 2d 332 at 340 (1964) Cert. Den. 379 U.S. 820 suggested *Jones* is inconsistent with rigid adherence to the corporate entity. Although it made no square holding on the problem involved here, the clear implication was that *Lagow* could not be followed.

Fifth Circuit.

Henzel v. United States, 296 F. 2d 650 (1961) again on facts similar to the facts herein, found that *Jones* compelled exclusion of the evidence. *Peel v. United States,* 316 F. 2d 907 at 909 (1963) distinguished *Henzel* because the appellants were not officers and directors nor were they in control of the corporation at the time of seizure but in no sense reaffirmed *Lagow. Lagow* was not cited in either case.

Tenth Circuit.

Villano v. United States, 10 F. 2d 680 (1962) found that the liberal trend produced by *Jones* required a finding that the appellant had standing to assert the illegality of the search of the corporate records. *Elbel v. United States,* 364 F. 2d 127, decided four years later, cited *Villano* and *Henzel* with approval

but found that the appellant therein no longer controlled the corporation because it was in the hands of a trustee in bankruptcy and he was a mere "borrower" not a shareholder. *Elbel* strongly implied that if the appellant had been an owner, the result would have been different.

The Federal courts have thus not followed *Lagow* since Jones, but instead have applied *Jones* with varying results depending on the facts in each case.

2. In California, evidence that is the product of an illegal search and seizure has been excluded since *People v. Cahan,* 44 Cal. 2d 434, 443 (1955). California courts exclude the evidence not because of any personal wrong against the victim but because exclusion of the evidence is the only way to deter unlawful police conduct. *People v. Martin,* 45 Cal. 2d 755.

The essence of this deterrence rationale is that by removing the basic incentive for illegal searches, *i.e.* the hope they will turn up evidence, the police will refrain from such searches. Unlike the personal incrimination theory which need not require exclusion if the evidence is to be used against another, the deterrence rationale requires exclusion any time the police have acted unlawfully.

The United States Supreme Court in *Linkletter v. Walker,* 381 U.S. 618 (1965) firmly committed itself to this deterrence rationale, noting that admission of the evidence in the past had not suppressed police lawlessness but rather had acted as a license for it (Linkletter p. 634). *Linkletter* has since been reaffirmed by *Tehan v. United States, ex rel. Shott,* 382 U.S. 406 (1966) finding deterrence of police mis-

conduct the "single and distinct" purpose of the exclusionary rule.

Lagow and *Jones* were decided before the Supreme Court's commitment to the deterrence rationale. Prior to Linkletter, it had not been clear whether the Supreme Court excluded evidence on the "personal incrimination" or "deterrence" theory. See *Standing to Object,* 24 Univ. of Chi. L.R. 342, 365 (1967). Although a standing case has not been decided by the Supreme Court since *Linkletter,* the Supreme Court's commitment to the deterrence rationale leaves the standing requirement of *Lagow* (and even *Jones*) without a theoretical or practical foundation. Deterrence cannot be served by admission of illegally obtained evidence against persons without "standing".

Conclusion.

The liberal trend in the Federal courts emanating from *Jones* effectively overruled *Lagow v. United States* (the basis of the decision below). This liberalization of the standing requirement combined with the Supreme Court's undermining of the foundations of standing by its commitment to the deterrence rationale in *Linkletter* compel exclusion of the corporation's records in this case and therefore reversal. Rehearing is not sought in respect to any other questions.

Dated at Los Angeles, California this 18 day of May, 1967.

Respectfully submitted,

GORDON & WEINBERG,
MITCHELL S. SHAPIRO,
Attorneys for Appellant Petitioner.

Certificate of Counsel.

I, Mitchell S. Shapiro, the attorney for the Appellant certify that this Petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

MITCHELL S. SHAPIRO